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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Misc. No. _____

SALIM FAKHOURY, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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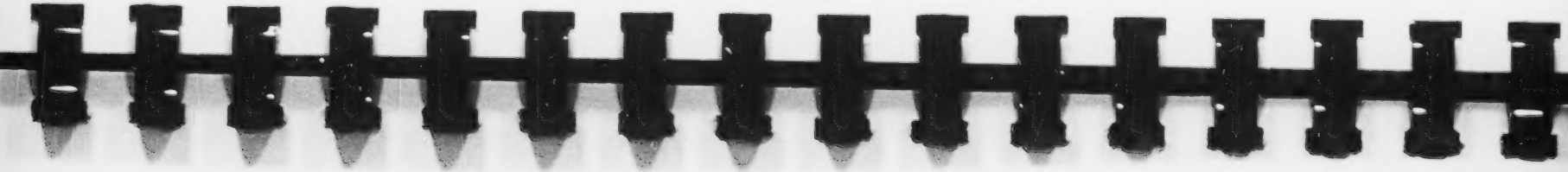

QUESTIONS PRESENTED

Whether the trial court failed to adhere to the guidelines set by this court under such cases as U.S. v. Robinson, 794 F.2d 1132 (6th Cir. 1986) and Strickland v. Washington, 466 U.S. 668, 686 (1984), for the protection of defendant's right to a fair trial and to deter prosecutorial misconduct.

Whether the defendant received a constitutionally guaranteed fair trial in view of the paucity of proof and interjection of multiple unrelated and unconnected business reversals.

Whether this court should have, sua sponte, protected the defendant's constitutional right of competent counsel after being advised that defense counsel was inexperienced.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 2

Whether the Court failed to adhere to guide-lines of U.S. v. Robinson, cert. granted 107 S.Ct. 1282 (1987).

Whether Defendant was denied constitutionally protected right to fair trial and due process by admission into evidence of prior, unrelated crimes and misconduct.

Whether Trial Court should have, sua sponte, protected Defendant's Fifth and Sixth Amendment rights after being advised that defense counsel was inexperienced.

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 6

OPINION BELOW 9

JURISDICTION 9

CONSTITUTIONAL AND STATUTORY PROVISIONS 10

STATEMENT OF THE CASE 11

ARGUMENT 2 2

Introduction 22

Reasons For Granting Writ of Certiorari 23

A. Evidence of Prior Misconduct 23

B. Prosecutorial Misconduct In Obtaining A Conviction 35

C. Review Under Plain Error Doctrine 45

D. Ineffective Assistance of Counsel 58

CONCLUSION 59

Appendix - Exhibit 1 (Police Report) App.1

Appendix - (Opinion and Judgment of Court of Appeals) App.2

Appendix - (FBI Transcript of Conversation with Salim Fakhoury) App.3

Appendix - (Constitutional Provisions and Statutes) App.4

RULES

Page

Rule 403 Federal Rules of Evidence 10, 24

Rule 404 Federal Rules of Evidence 10, 23 35

Rule 52 Federal Rules of Criminal Procedure 10, 45

CONSTITUTIONAL PROVISIONS

Fifth Amendment 10, 47

Sixth Amendment 10, 47

Fourteenth Amendment 10, 47

TABLE OF AUTHORITIES

CASES:	Page
Angel v. Overberg, 664 F.2d 1052 (6th Cir. 1981)	44
Berger v. United States, 294 U.S. 78 (1934)	41
Government of Virgin Islands v. Toto, 529 F.2d 278, 283 (3rd Cir. 1976)	34
Kotteakos v. United States, 328 U.S. 750at 765 (1946)	25
McFarland v. Smith, 611 F.2d 414, 419 (2nd Cir. 1979)	54
Paris v. United States, 260 F. 529 531 (8th Cir. 1919)	34
Strickland v. Washington, 466 U.S. 668 (1984)	3, 55
United States Ex Rel. Bleimehl v. Cannon, 525 F.2d 414 (7th Cir. 1975)	23
United States v. Boroni, 758 F.2d 222, 224 (7th Cir. 1985)	24,25
United States v. Bruscino, 662 F.2d 450 (7th Cir. 1981)	42,43
United States v. Fierson, 419 F.2d 1020, 1022-23 (7th Cir. 1969)	27

United States v. Grabiec, 563 F.2d 313 (7th Cir. 1977) 23

United States v. Mascio, 774 F.2d 219 (7th Cir. 1985) 35

United States v. Ring, 513 F.2d 1001, 1009 (6th Cir. 1975) 27

United States v. Robinson, 794 F.2d 1132 (6th Cir. 1986) 3,44, 48,49, 54

United States v. Shackleford, 783 F.2d 776 97th Cir. 1984) 24,26, 27,28, 32

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038 (1985) 45,48

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The Petitioner, SALIM FAKHOURY, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding May 26, 1987.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, 819 F.2d 1415, appears in the Appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit affirmed the petitioner's conviction. The opinion was entered on May 26, 1987. No petition for re-hearing was filed. A motion for extension of time in which to file a Petition for Writ of Certiorari was filed in the United States Supreme Court. The Court entered an order extending the time in which to file a Petition for Writ of Certiorari up to and including August 24, 1987. The jurisdiction of this Court is invoked

under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues raised in this petition involve the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Rule 403 and Rule 404 of the Federal Rules of Evidence and Rule 52 of the Federal Rules of Criminal Procedure. These provisions are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

The petitioner, SALIM FAKHOURY, was charged with and convicted of one count of attempted arson [18 U.S.C. Sec. 844(i)] and three counts of mail fraud [18 U.S.C. Sec. 1341]. The attempted arson conviction was based solely on circumstantial evidence. The mail fraud convictions were predicated on the attempted arson conviction.

In June 1982, the petitioner and his father, Jamil Fakhoury, purchased CasaBlanca Liquors and Groceries, Inc. (Chicago, IL) from Naji Farhoud. The purchase price was $108,000.00. Of that amount, Farhoud received $70,000.00 in cash; the balance was financed.

In August 1984, the FBI received a tip from an informant concerning the possibility of soliciting someone to

"torch" CasaBlanca. Based on this information, FBI undercover agent Vina approached SALIM FAKHOURY with the obvious artifice of volunteering his services for hire as a torcher. The significant part of the transcript is attached hereto as an exhibit.

SA VINA:	All right I'll tell ya what, why I'm here I was uh, I heard that you were looking for somebody to take care of your business here.
SALIM:	In which way.
SA VINA:	I don't think were you looking for somebody to uh, oh I thought maybe you had uh, oh you don't you're not, hmm...
SALIM:	Where you live at?
SA VINA:	Huh?
SALIM:	Where you live at?
SA VINA:	Where do I, oh I live right a few blocks there.

SALIM: Yeah?

SA VINA: I just heard that you might have been interested.

SALIM: No.

SA VINA: No? Well thought maybe I could uh...

SALIM: I I I got another guy working here. Uh remember here brother-in-law.

SA VINA: Your brother-in-law. No, I don't know if he uh you understand what I'm saying?

SALIM: Yeah.

SA VINA: What am I saying?

SALIM: You want to, you want to run the show here.

SA VINA: No, no, no, no, no.

SALIM: No, I don't know what you're talking about then. Just say it clear.

SA VINA: Uh I heard on the street that you need somebody to torch your place.

SALIM: Out on the street?

SA VINA: Yeah, you know street talk. You know you're looking for somebody to do it.

SALIM: You heard on the street?

SA VINA: (Laughs).

SALIM: Serious?

SA VINA: Yeah, so...

SALIM: Who told you that?

SA VINA: Fine, you know that's why I'm here you need uh...

SALIM: I thought you were talking about work?

SA VINA: No I was talking about uh, well it's work but uh you know I mean. Are are you the owner?

SALIM: Yeah, yes.

SA VINA: You you...

SALIM: I'm happy with the business the way...

SA VINA: Oh you are happy with it? Oh, cuz I heard you were not happy with

the business and you wanted, you were looking for somebody...

SALIM: I don't know who told you that. They probably the one's they try to burn the place already 4-5 times.

SA VINA: Oh they did? Oh?

SALIM: I don't know who tell you could be he's the one.

SA VINA: You think he the one who tried to...

SALIM: The place well...

SA VINA: I just heard the business was...

SALIM: ...the last two years.

SA VINA: Oh is that right?

SALIM: Try to burn the place 4 - 5 times.

SA VINA: I just heard that the business was pretty bad and you wanted to uh you know...

SALIM: Well the (inaudible).

SA VINA: Are are you the owner?

SALIM: Yeah.

SA VINA: What's your name?

SALIM: Sam.

Fakhoury was vehement in telling the agent that he (Fakhoury) did not want to burn down the business, did not know from whom the agent had received the misinformation, that the information was false and that 4 or 5 attempts to burn his shop had been made earlier. The defendant had reported these prior attempted arsons on the property. (T.591-592)

CasaBlanca was the subject of arson on September 25, 1984. Despite the information imparted to the FBI that there had been four or five attempts on the Defendant's property, the FBI did not pursue this inquiry or provide the Defendant with Jencks Act material to

determine the identification of or role played by the informant in the multiple fires. The record does not reveal that any steps were taken by the Government to locate or tie the informant to the arson. Nor did the Government investigate the misnomer concerning which "Sam" the informant was alluding to herein.

The Government presented no evidence at trial which directly established SALIM FAKHOURY'S involvement in the arson. In fact, other than the fact that the Defendant owned the store and had some menial exposure to electrical devices having worked as an assembler, the Government's case consisted entirely of evidence which was related only to Fakhoury's prior financial problems with food stamps (T.228-229), food coupon (T.610-618) and tax improprieties (T.234-

240).

Additional "evidence" introduced by the Government against Fakhoury submitted during the Government's case-in-chief included:

1. Fakhoury was a gambler;

2. Fakhoury sold outdated food products and "bad meat";

3. Fakhoury had written bad checks and maintained a negative balance on the store's checking account;

4. The CasaBlanca had been "hot-wired" with a timer; the building was locked; a witness testified that he was the sole possessor of the keys to the establishment and that Defendant did not have them; the burglar alarm was in working order; Commonwealth Edison had no record of rewiring the store fuse box;

5. Fakhoury had renewed the

insurance policy maintaining coverage on the store property;

6. Fakhoury's creditors were seeking payment of past due accounts;

7. Subsequent to the September 25, 1984 arson, Fakhoury filed insurance claims for the property damage; and

8. Fakhoury's brother-in-law had a set of keys to the store on the night of the fire.

9. The Defendant exaggerated his insurance claim.

At no time was there any evidence directly connecting the Defendant with the arson; nor was his presence ever established at CasaBlanca at or about the time of the fire. The record is silent as to the Government's technical investigation to determine the source of the incendiary material, the manner of

entry (with the uncertainty as to the possession of keys) and any tie to the defendant concerning footprints, fingerprints or other identifying material. There was no evidence identifying the Defendant to the scene, including fire marks.

Although there was an investigation by the Chicago Police Department and a witness identified an "unknown black male," the Court rejected this evidence. Because it was vital to the Defendant's case, it is attached hereto as Exhibit 1.

In addition, during closing arguments, the Government was allowed to make numerous prejudicial references to Fakhoury's character allegedly based on inferences from the evidence. Fakhoury's counsel was prohibited from commenting on the reliability of the FBI informant's

"tips", and was never provided with the identity of the informant or how the informant had obtained the information of a pending arson.

Fakhoury was convicted on all counts and sentenced to eight years in prison.

ARGUMENT

Introduction

This Court's recognition of improprieties inherent in the trial and appellate processes is paramount to "right past judicial wrongs". The writ of certiorari is the appropriate vehicle employed by the Court to accomplish this task.

In this case, the defendant, SALIM FAKHOURY, has been subjected to incarceration as a result of a series of judicial and prosecutorial errors. The contradictory and inconsistent application of the law throughout the trial, the ineptness of trial counsel and appellate inconsistency presents this Court with a confused and uncertain state of the law concerning the question of

error and prosecutorial misconduct necessary to reverse a conviction.

It is, therefore, incumbent upon this Court to grant certiorari to remedy the prejudice already heaped upon the defendant.

Reasons for Granting Writ of Certiorari

A. Evidence of Prior Misconduct.

Nearly all the evidence introduced against Fakhoury at trial consisted of evidence of his alleged prior misconduct. Evidence of uncharged misconduct is generally inadmissible, United States v. Grabiec, 563 F.2d 313 (7th Cir. 1977), and constitutes prejudicial error. United States Ex Rel. Bleimehl v. Cannon, 525 F.2d 414, 417 (7th Cir. 1975).

Admissibility of prior misconduct is governed by Rule 404(b) of the Federal Rules of Evidence. This rule allows the

introduction of such evidence only when it is "directed at something other than propensity". United States v. Shackleford, 783 F.2d 776 (7th Cir. 1984). Rule 403 excludes evidence "if its probative value is substantially outweighed by the danger of unfair prejudice". Fed. R. Evid. 403. However, evidence of intrinsic conduct may be admitted to

> ... establish a matter in issue other than propensity to commit the charge if: 1) the prior act is similar and close in time to the offense charged; 2) evidence of the prior act is clear and convincing; and 3) the probative value outweighs the danger of unfair prejudice. (citation omitted)

United States v. Boroni, 758 F.2d 222, 224 (7th Cir. 1985).

Furthermore, it is hornbook law that a conviction "substantially swayed" by evidence of prior misconduct must be

reversed. United States v. Boroni, at 225, Kotteakos v. United States, 328 U.S. 750 at 765 (1946). The rationale behind such a rule is to prevent a trial on an indicted offense from becoming a forum for accusation of the defendant on unrelated acts which have no bearing on the indicted offense.

In the present case, other than the evidence of alleged other acts by Fakhoury, the Government's evidence was simply circumstantial. There were no eyewitnesses to the arson; no fingerprints were found that directly proved Fakhoury was the perpetrator. And, in its condemnation of the Government attorney, the Court of Appeals conceded that the sole purpose of introducing evidence of extrinsic conduct was to prejudicially establish Fakhoury's

propensity to commit the crime solely because of finances. The evidence of prior conduct did not tend to indicate an intent to commit the charged conduct and bore no relation to the charges of arson or mail fraud. The appeals opinion concedes the above. To be admissible, uncharged misconduct is offered to show intent, but is inappropriate when the purpose is to show motive.

An examination of the relationship between the alleged prior misconduct and the arson charge reveals that the evidence was irrelevant to the issue of intent. While it is true that evidence of prior similar crimes may be introduced to indicate a defendant's intent to commit the charged conduct, [United States v. Shackleford, at 776] when intent is only a "formal issue", evidence

of extrinsic conduct cannot be used against the defendant to demonstrate his intent to commit the charged crime. United States v. Shackleford, at 781. In the present case specific intent was never introduced as an issue by the Government. Rather, the issue of intent was inferred from the circumstantial "proof of the proscribed acts". Id., United States v. Fierson, 419 F.2d 1020, 1022-23 (7th Cir. 1969). As another court observed, allowing intent to automatically become an issue in this class of cases "would virtually swallow the rule against admission of evidence of prior misconduct". United States v. Ring, 513 F.2d 1001, 1009 (6th Cir. 1975). Admission of the evidence of prior alleged misconduct introduced against Fakhoury cannot be excused as an

indicator of the appellant's intent to commit arson.

In the present case the allegations of misconduct are totally foreign to the charge of arson to sustain admissibility as evidence. Admissibility requires that the other act be similar enough to be relevant to the matter in issue. United States v. Shackleford, at 779.

To buttress its position that Fakhoury's greed and concern for his finances were his motivation to commit arson and mail fraud, the Government was allowed to introduce evidence which showed that Fakhoury was involved in some type of food stamp (T.228-229), food coupon fraud (T.329, 831-836), income tax (T.236-240) and state withholding tax problems (T.234-236), gambling (T.336-340) and selling outdated food products

(T.264-65, 278). This evidence was offered to prove that Fakhoury's difficult financial situation motivated him to commit the charged conduct.

In closing argument, the Assistant United States Attorney emphasized this theme, charging, for example, Fakhoury with the crime of lying on his tax returns (T.1121). The Government attorney also charged that Fakhoury redeemed food stamps because it benefited him (T.1121); that he cheated on his employment tax returns because it put a "few more dollars in his pocket" (T.1121); and that he wrongfully redeemed food coupons "to feed his greedy little appetite" (T.1121-1123). It was against this background of innuendo concerning events that cannot rise above simple negligence, at best, that Fakhoury was

convicted.

While activities such as improperly cashing food stamps (T.228-229), errors on income tax returns (T.236-240), and clipping food coupons may demonstrate bad bookkeeping, they do not approach the gravity of an arson charge. Likewise, there seems to be no legitimate purpose for including as evidence accusations of gambling (T.336, 340) and selling food products after the manufacturer's suggested sale date. (T. 264-265, 278). Allegations of these totally insignificant activities were admitted, used against Fakhoury for an impermissible purpose -- to depict him as an irresponsible individual and bad character --and argued prejudicially to the jury.

But the error does not conclude here.

The Government used "other crimes evidence" to prove the mail fraud counts as well. Essentially, the Government used the same "extrinsic conduct" to prove that Fakhoury used the postal system to defraud his insurance carrier. The government's successful conviction of Fakhoury on the charges of mail fraud was a direct result of its ability to persuade the jury that Fakhoury destroyed his store --without proof. Yet, the fraudulent activity the Government introduced as prior misconduct included allegations of crimes and, certainly, none remotely related to arson. Because the activity alleged as prior misconduct and the charged arson are so disproportionate in scope, the evidence of extrinsic evidence is not sufficiently similar to be relevant to any matter in

issue and its admission was reversible error. United States v. Shackleford, at 779.

During the trial the Government repeatedly charged that greed motivated Fakhoury to commit both the charged and uncharged conduct. (T.1121-1123). The use of prior similar conduct to demonstrate a defendant's propensity to commit crime is precisely what case law and Federal Rule of Evidence 404(b) have persistently excluded as inadmissible. United States v. Mascio, 774, F.2d 219 (7th Cir. 1985). The Court of Appeals failed to distinguish between the proofs.

In addition, the evidence of misconduct was replete with foundational flaws. For instance, the Government "proved" that Fakhoury never responded to a complaint for improper coupon

redemption even though substitute service was supposedly had upon the defendant's son on March 20, 1985.[1] (T.619, 620). Yet, the evidence showed that Fakhoury's children are infants. (T.972) Furthermore, the business consultant who assisted CasaBlanca's previous owner with his business affairs testified at trial that he "had half a notion" that the food redemption suit involved money owned by Naji Farhoud, the store's previous owner. In fact, the consultant, Tom Neville, said he "discounted the situation" because he felt it was possible that Coupon Redemption, Inc. [the company which sued Fakhoury] was turning to Fakhoury for money it was owed by the store's previous owner. (T.206-207)

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1 The service was quashed and the judgment was subsequently vacated on March 10, 1987.

This is the caliber of evidence admitted at trial; it does not approach the clear and convincing standard required by law.

As early in 1919, one court reflected that evidence of prior misconduct:

> ... tends to draw the attention of the jury away from a consideration of the real issues on trial to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial.

Paris v. United States, 260 F. 529, 531 (8th Cir. 1919).

The danger of the admissibility of such evidence was noted by another court which stated:

> ... When prior crime evidence ... reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk.

Government of Virgin Islands v. Toto, 529

F.2d 278, 283 (3rd Cir. 1976).

In light of the fact that the Government's circumstantial evidence of "similar prior misconduct" was not even marginally relevant, Fakhoury respectfully submits that this Court must grant certiorari to review the multitude of constitutional infringements heaped upon him.

B. Prosecutorial Misconduct In Obtaining A Conviction.

Prosecutorial misconduct, which was most highly magnified during the closing argument, cannot be isolated from the trial admissions upon which the argument was based.

Rule 404 of the Federal Rules of Criminal Procedure provides:

> "Evidence of a person's character, or a trait of his character is not admissable for the purpose of proving that he acted in

> conformity therewith on a particular occasion ... Evidence of other crimes, wrongs or acts is not admissable to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissable for other purposes, such as proof of motive ..."

Allegedly, the evidence of prior misconduct was admitted in this case to show motive -- not intent.

And, while the Court of Appeals stated that Fakhoury's Appellate Brief "mischaracterized" the trial evidence, an examination of the Government's closing argument supports Fakhoury's characterization of the trial evidence.

Specifically, the Government attorney argued:

> "Let's start with the financial documents. Let's start with the sales tax returns, ladies and gentlemen. And this, as well as every other document will show one thing: Salim Fakhoury was a selfish individual who only did things to benefit himself. There

is no doubt those tax returns are false. You can tell that by looking at the food stamps that were redeemed.

So he lied on his tax return, ladies and gentlemen. And why did he lie? Because it benefited him.

You heard the testimony of the Illinois Department of Revenue. Sales tax has to be paid when you file those tax returns. So by cutting the amount of his sales, he was able to cheat the government out of a few more dollars." (T.1120)

In addition, the United States Attorney argued:

"... he cheated on his employment tax returns ... he paid them in cash. And why did he do this? Another thing that would benefit Salim Fakhoury and no one else. A few more dollars in his pocket.

What else do we know about him. What other fraud did he commit? Let's talk about coupon redemption for a few moments. He lined his pockets, illegally ... he had a ma and pa grocery store on a corner ... he committed those lies (false applications to the coupon companies) for one reason, to line his own pockets, because even

though he was cheating, the skim off the store was not enough to feed his greedy appetite, so he had to go into the coupon redemption business ..." (T.1121)

And, to compound the reversible error created by the argument on irrelevant prior acts, the Government ever argued facts to the jury which had been specifically excluded from evidence:

"Q: So it was a fair assumption that the money that was deposited in the personal account from the coupon redemption, the large majority went to pay for a down-payment on the house?

Mr. Maniscalco: I object to that, Your Honor.

The Court: Sustained.

Mr. Conway: I will withdraw the question." (T.332)

Notwithstanding that the Court sustained the objection, the prosecution argued:

"(Salim Fakhoury) starting putting in the coupons, almost $14,000.00, and with that, by 1984,

> he had enough money to buy his dream house ...
>
> And how did he finance that? Through the coupons ... that is how he came up with the $35,000.00 and the $5,000.00 payment to Century 21. You can trace those checks right through there."

Clearly these arguments far exceed the purpose for which the prior misconduct was admitted. These arguments do not prove motive; rather, they paint a picture of a hardened habitual criminal-- a picture which is impermissible under the rules of evidence.

The Government attorney continued his argument by making highly prejudicial and inflammatory comments about Fakhoury's ethnic background and the circumstances surrounding the death of Fakhoury's father:

> "Ladies and gentlemen, there is one crime that stands out above all others in the criminal justice system, and that crime is murder,

and except for a series of very fortunate circumstances, Salim Fakhoury would be standing in this court with blood on his hands. Do you think he thought about innocent passerbys? How about people who lived and worked in the neighborhood? What about the firemen? You heard about the possibility of backdraft. I think we were very fortunate the firemen were able to come in and testify. What would happen if one of them had gotten hurt or killed, ladies and gentlemen? Do you think Salim Fakhoury thought about that? Absolutely not. He is greedy and he is selfish. He did not think about anyone else in the community. He did everything in this case to benefit one person, and that is him, him alone." (T.1139)

and

"The other thing that I wanted to talk about is the father's death. This is not a murder case. That is not to be decided here. But, from where I am sitting, I will tell you a couple of things. Who stood to gain the most from the father's death? Who wanted to sell the store and wasn't allowed to by the father? Who is the number one son? Who was taking money from the store that Mr. Neville told you he complained about his own father, complained to a stranger? There are serious questions here, but

> they are not to be resolved in this case. This case is about the arson on the 51st Street and that is where your consideration."

and

> "The defendant came to this country in 1974, and when he came to this country, he agreed to obey the law, to come into this land of opportunity, and to look for opportunities. And he did find one ... but it wasn't good enough for him. He wanted more, and he wanted more fast. He had big plans. He wanted quick, easy success.
>
> And America (sic) became not the land of opportunity, but the land of fraud, and we see one fraud unfold after the next."

In Berger v. United States, 294 U.S. 78 (1934) this Court, in prohibiting a Government attorney from the use of insinuations, misstatement of facts and commenting on facts or information not in evidence held:

> "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a

just one."

All that is required to reverse is a "reasonable possibility" that admitted information may prejudicially influence the jury. United States v. Bruscino, 662 F.2d 450, (7th Cir. 1981).

Yet, while the Court of Appeals considered this conduct "reprehensible", it did nothing to remedy the fact that Fakhoury was denied a fair trial because of this conduct. In fact, it even criticized the trial judge for not interceding (see page 14 of Opinion). As a result, the Court of Appeals opinion leaves open a pivotal question: How much misconduct is sufficient to warrant reversal of a guilty finding? Also, the opinion confuses the issue of which constitutional right is more important: the right to refuse to testify on one's

own behalf or to obtain a fair trial? There is a glaring illogic in this plethora of constitutional gradations: how can the Court of Appeals conclude that the prosecutor's conduct was "reprehensible" and in the same breath conclude that it did not affect the jurors' mentality? This Court is well aware of the fact that a single comment may sway the attitude of the jurors and improperly taint a verdict and an error need not be singularly drastic to require a new trial. U.S. v. Bruscino, at 450.

Although when considered in isolation, the individual comments by the prosecuting attorney may not constitute reversible error, taken as a whole this Court can reach no other conclusion save that Fakhoury suffered irreparable prejudice at the hands of the Government.

Angel v. Overberg, 664 F.2d, 1052 (6th Cir. 1981) reversed for other reasons.

It is an a priori observation that if it is a clear violation of the defendant's constitutional right for the prosecutor in his closing argument to mention that the defendant did not testify (United States v. Robinson). It would be equally violative of the defendant's constitutional right to permit the prosecutor to change the jurors' perception of the defendant simply because the prejudice stems from prosecutorial and trial errors. This could be equally as persuasive upon the minds of the jurors as when the prosecutor comments upon the defendant's character.

For this reason, Fakhoury respectfully submits that this Court should grant

certiorari.

C. Review Under the Plain Error Doctrine.

The Court of Appeals reviewed the Government attorney's remarks in closing argument in accordance with the Plain Error Doctrine.

This doctrine is enunciated in Rule 52(b) of the Federal Rules of Criminal Procedure:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention to the Court."

In reviewing a claim to determine if the "plain error" standard is present, the Court must evaluate the entire record. United States vs. Young, 470 U.S. 1 (1985). As noted ante, the record is replete with prejudicial arguments and evidence.

In evaluating the Fakhoury claim, this Court must bear in mind that Fakhoury's counsel admitted to the Court that he was "inexperienced". It is apparent that the Government attorney took advantage of the inexperience of Fakhoury's counsel by making "reprehensible" remarks solely to incite the jurors' prejudices knowing that defense attorney was inexperienced and did not know when or how to object. The Plain Error Rule must be viewed against this backdrop of the defense lawyer's inexperience since the distinction between objection to evidence and plain error presupposes competency of a lawyer in protecting his client. The inflammatory comments about the defendant's ethnic background, the death of his father, and other unrelated and uncharged crimes, frauds and insinuations

were a denial of due process of law and a fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments.

The Court of Appeals conceded this fact when it noted "...the evidence of appellant's guilt is not overwhelming..." However, the Court refused to remedy the denial of due process when it stated:

> "Thus on this record, we hold that the prosecutor's closing argument, although highly improper, did not constitute plain error.
>
> While we do not believe that the misconduct of the prosecutor in this case justifies reversal of the conviction, we frankly do not understand why the trial judge allowed this unprofessional conduct to go unsanctioned. Remarks of this nature are reprehensible when uttered by any member of the bar. When they come from the mouth of the representative of the United States, they demean in a very special way the administration of justice."

In essence, the Court of Appeals illogically concluded that the Government

attorney's "reprehensible" conduct, combined with a paucity of evidence, had no effect on the jury's mind frame.

This denial of due process evidenced in Fakhoury's case is analogous to that considered by the Court in United States v. Robinson, 794 F.2d 1132 (6th Cir. 1986) cert. granted 107 Ct. 1282 (1987).

In Robinson, the defendant's convictions were reversed because of the prosecuting attorney's comments on the fact that defendant did not testify on his own behalf. The Court, citing United States v. Young, at 1038), held that such comments were "sufficiently egregious" as to constitute plain error and mandate reversal. In further reference to Young, the court noted that:

> "Courts have a concern about a prosecutor's injection of his personal views about a defendant's guilt because the prosecutor is not

> only an advocate but he is also 'an administrator of justice'... (citation omitted) The jury may view the prosecutor as possessing some kind of special 'inside information' that leads him to a personal view of guilt; thus the prosecutor is ethically precluded from an attempt to take advantage of his special position as representative of the people and as administrator of the justice system within his sphere of authority ... (at page 1136)

The Robinson court also noted that the plain error rule must be applied in situations where prosecutorial misconduct has "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice." (at page 1137).

In the present case, the Circuit Court of Appeals acknowledged that the prosecutor's comments regarding Fakhoury's ethnicity, the death of his father and unrelated prior "bad acts" were "reprehensible". Yet it belies all

logic that the Court could approve comments such as:

> "Ladies and gentlemen, there is one crime that stands out above all others in the criminal justice system, and that crime is murder, and except for a series of very fortunate circumstances, Salim Fakhoury would be standing in this court with blood on his hands. Do you think he thought about innocent passerbys? How about people who lived and worked in the neighborhood? What about the firemen? You heard about the possibility of backdraft. I think we were very fortunate the firemen were able to come in and testify. What would happen if one of them had gotten hurt or killed, ladies and gentlemen? Do you think Salim Fakhoury thought about that? Absolutely not. He is greedy and he is selfish. He did not think about anyone else in the community. He did everything in this case to benefit one person, and that him, him alone." (T.1139)

and

> "Let's start with the financial documents. Let's start with the sales tax returns, ladies and gentlemen. And this, as well as every other document will show one thing: Salim Fakhoury was a selfish individual who only did

things to benefit himself. There is no doubt those tax returns are false. You can tell that by looking at the food stamps that were redeemed.

So he lied on his tax return, ladies and gentlemen. And why did he lie? Because it benefited him.

You heard the testimony of the Illinois Department of Revenue. Sales tax has to be paid when you file those tax returns. So by cutting the amount of his sales, he was able to cheat the government out of a few more dollars." (T.1120)

and

"(Salim Fakhoury) starting putting in the coupons, almost $14,000.00, and with that, by 1984, he had enough money to buy his dream house ...

And how did he finance that? Through the coupons ... that is how he came up with the $35,000.00 and the $5,000.00 payment to Century 21. You can trace those checks right through there."[2]

---

[2] This evidence was specifically objected to and sustained (T.332); yet the prosecutor commented on rejected testimony.

and

> "The defendant came to this country in 1974, and when he came to this country, he agreed to obey the law, to come into this land of opportunity, and to look for opportunities. And he did find one ... but it wasn't good enough for him. He wanted more, and he wanted more fast. He had big plans. He wanted quick, easy success.
>
> And America (sic) became not the land of opportunity, but the land of fraud, and we see one fraud unfold after the next."

and

> "I don't think I would want my worst enemy to serve their baby post-dated formula." (T.1126)

and

> "The other thing that I wanted to talk about is the father's death. This is not a murder case. That is not to be decided here. But, from where I am sitting, I will tell you a couple of things. Who stood to gain the most from the father's death? Who wanted to sell the store and wasn't allowed to by the father? Who is the number one son? Who was taking money from the store that Mr. Neville told you he complained about his own father, complained to a stranger? There

are serious questions here, but they are not to be resolved in this case. This case is about the arson on the 51st Street and that is where your consideration."

and

"... he cheated on his employment tax returns ... he paid them in cash. And why did he do this? Another thing that would benefit Salim Fakhoury and no one else. A few more dollars in his pocket.

What else do we know about him. What other fraud did he commit? Let's talk about coupon redemption for a few moments. He lined his pockets, illegally ... he had a ma and pa grocery store on a corner ... he committed those lies (false applications to the coupon companies) for one reason, to line his own pockets, because even though he was cheating, the skim off the store was not enough to feed his greedy appetite, so he had to go into the coupon redemption business ..."[3] (T.1121)

could not have "the possibility" of

---

[3] Argument in violation of cautionary instruction and purpose for which coupons were admitted.

negatively influencing the jury.

When these comments are compared to the single comments made by the prosecutor in Robinson, there should be no question that this Court acknowledge that the remarks made to the Fakhoury jury "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice." This Court should grant certiorari to rectify the prior judicial and prosecutorial errors.

Since the Appeals Court also conceded on page 11 of its opinion that the prosecution deliberately sought to prejudice the jurors with references of his Jordanian heritage, sufficient in itself to reverse a conviction, the language in McFarland v. Smith, 611 F.2d 414, 419 (2nd Cir. 1979) (citing numerous authorities Appeals Dist. authorities) is

directly apropos:

> "These considerations lead to the conclusion that the prosecutor's argument is constitutionally impermissible. It invokes race for a purpose that is either illogical or of very slight and uncertain logical validity, and does so at a distinct risk of stirring racially prejudiced attitudes. The evils of racial prejudice lurk too frequently through the administration of criminal justice. They must be condemned whenever they appear. The Constitution forbids the racial remarks in the summation that preceded petitioner's conviction."

D. Ineffective Assistance of Counsel.

Throughout this case, Fakhoury has insisted that he was innocent and that he was denied a fair trial because ineffective assistance of counsel precluded a fair hearing of his defense.

The standard upon which the Court determines ineffective assistance of counsel was stated in Strickland v.

Washington, 466 U.S. 668, 686 (1984):

> "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

Fakhoury's counsel had a serious negative effect on the presentation of his defense. For example:

During the course of Fakhoury's trial, his counsel, Nicholas Maniscalco, was repeatedly chastised by the Court for improper conduct. (T.113-115)

Typical of instances wherein this counsel was incompetent or inexperienced are that he:

1. Left the courtroom during the direct examination of a government witness -- only to be chastised;

2. Made no more than six objections to the admissibility of testimony and/or

evidence during a seven-day trial;

3. Admitted his "inexperience" to the judge;

4. Failed to recuse himself as counsel when it became apparent that a critical witness bore the same surname as defense counsel;

5. Failed to file a motion to suppress a statement made in violation of Miranda warnings;

6. Wrote a letter to the district judge which recited his lack of preparation or investigation prior to defendant's sentencing; and

7. Failed to object to the "reprehensible" arguments made by the Government attorney.

At trial, Carlo Maniscalco, Fakhoury's brother-in-law, worked with Fakhoury at the CasaBlanca store. (T.905-913) In

fact, Carlo Maniscalco's testimony was one of the focal points of the Government's attack in closing argument. At one point, the Government attorney noted that Maniscalco was caught "in a couple of lies". (T.1138-1139) The jury, now led to distrust Carlo Maniscalco, was obviously inclined to distrust Nicholas Maniscalco, Fakhoury's attorney, because they shared the same surname.

Furthermore, by letter dated September 16, 1986, Nichōlas Maniscalco told the District Court Judge (prior to defendant's sentencing) that he would have advised his client to plead guilty. The letter evinced a lack of regard for Fakhoury's insistence that he was innocent and even interfered with a newly retained counsel's efforts to secure a fair sentence.

CONCLUSION

For the reasons hereinabove stated, Petitioner respectfully prays this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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* Trial counsel has appended his appearance herein in the event this Court desires clarification of any matter raised in this brief.

INVESTIGATION CONTINUED: belt when he was laid off from Danly Machine Company. He was asked if the tools and belt were left at the store at the time of the fire, he related no. His brother-in-law, Salim, took them home because the tools were being stolen from the store.

On 1 October 1984 at 1300 hours this Detective and Detective Majder met with Carl MANISCALCO at the Bomb and Arson Office. He took Reporting Detectives to the gas station across the street from the store to interview the guy in the gas station who may have talked to the arsonist.

C l i f t o n MOORE, gas station attendant was interviewed concerning what he told Carl MANICALCO. He related that a unknown male black told him that he heard from another person, that the other person was offered money to burn the store by "Geronimo (victim's cousin), owner of the store on the corner, Star Food & Liquor. MOORE does not know either of these persons, but if he sees the one who gave him the information, he will recontact this Detective.

T h i s Detective requests that this report be suspended for reporting purposes at this time; however, this investigation is

continuing as a joint investigation with the FBI. All new leads and information will be the subject of following supplementary reports.

Detective Thomas M. Kocur, Star #4552
Bomb and Arson Section

Detective Richard Majder, Star #8948
Bomb and Arson Section

Approving Supervisor:_____ #____

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2583

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALIM FAKHOURY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 92—**James F. Holderman**, *Judge.*

ARGUED FEBRUARY 26, 1987—DECIDED MAY 26, 1987

Before CUDAHY, RIPPLE, and MANION, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Appellant Salim Fakhoury was charged with one count of attempted arson in violation of 18 U.S.C. § 844(i) and three counts of mail fraud in violation of 18 U.S.C. § 1341. After a seven-day trial, the jury found Mr. Fakhoury guilty on all counts charged in the indictment. The appellant challenges his convictions on the grounds that: 1) there was insufficient evidence to support the convictions, 2) evidence of prior misconduct was improperly admitted, 3) he received ineffective assistance of counsel, and 4) his right to confront an adverse witness was violated because the government did not disclose the identity of a confidential informant. For the reasons set forth in this opinion, we affirm the appellant's convictions.

I

Facts

The appellant and his father, Jamel Fakhoury, bought Casa Blanca Liquors & Groceries located in Chicago, Illinois in June 1982 for approximately $108,000. In August 1984, the Federal Bureau of Investigation (FBI) received a tip from an informant that an arson was being planned for the grocery store. Responding to this information, an FBI agent posed as an arsonist and, in a recorded conversation with the appellant, offered to burn the grocery store. The appellant declined the agent's offer. The FBI then conducted a surveillance of the store on September 23 and 24.

On September 25, a fire was set in the store. The fire fighters who arrived at the store testified that there was no indication of a forced entry onto the premises and that the store doors and windows were secure. The store's alarm system sounded when the fire fighters entered the store. Testimony indicated that the alarm system allowed only thirty seconds to turn off the alarm after the door contacts were broken.

The fire department officers discovered that a gasoline-type fuel coated the store, including the store's merchandise and records. The store's fuse box and wiring system had been "hot wired" so that a steady electrical current could continue uninterrupted to an outlet located behind the meat counter. Two orange extension cords were connected to the outlet and led to cans of gasoline placed in two separate areas of the store. The store was not destroyed because it was not vented and consequently there was an insufficient amount of oxygen to fuel the flames. In fact, the fire fighters had to vent the store from the roof before they opened the ground level doors to avoid an explosion. Fire investigators determined that the fire had been started intentionally.

The government introduced evidence to demonstrate the appellant's motive and opportunity to commit the attempted arson. The appellant and Carl Maniscalco, the appellant's

brother-in-law, shared the only set of keys to the store. Mr. Maniscalco testified that the keys for the store were in his possession on the night of the fire. However, the appellant stated, in an interview with the FBI on the evening of September 25, that Mr. Maniscalco had dropped off the keys at his home at about 10:30 p.m. on September 24. The appellant possessed experience working with electrical equipment because he had been employed at Danly Machine Company as an electrical assembler for several years. Although Mr. Maniscalco testified otherwise, one of the appellant's neighbors testified that she saw Mr. Maniscalco deliver a package of orange electrical cords to the appellant's home in early September 1984.

The government also introduced evidence of both the store's and the appellant's deteriorating financial condition to demonstrate the appellant's motive to commit arson. The government offered evidence of a substantial number of insufficient checks drawn on the store's account, declining purchases from suppliers and reduced food stamp redemptions (both representing fewer sales), and $97,000 of debts owed to creditors. In addition, city health inspectors testified that the store's condition violated health code standards because the store's walls were unclean and post-dated food remained on the shelves. Further, various coupon redemption centers were seeking to recover money that they had remitted to the appellant for coupons he had redeemed on the ground that he submitted far more coupons than could have been used by the store's customers. Finally, the appellant's individual bank account declined from an initial balance of $18,972.29 in January 1984 to a negative balance of $410.66 in September 1984. The government also submitted evidence showing that on September 4, 1984, a $40,000 loss of earnings clause was added to the store's $150,000 insurance policy.

After the fire, the appellant sent three separate proof-of-loss statements to his insurance company. In all three statements, the appellant certified that he had not caused the fire. In the first statement, the appellant claimed estimated losses of $97,033.66. An adjuster from an inde-

pendent adjustment firm handling the claim on behalf of the insurance company estimated that the appellant's claim was overstated by at least two-hundred percent. The appellant's second claim was identical to the first. In his third claim, the appellant claimed the same amount of losses but certified that they were his actual, rather than estimated, losses.

II

Analysis

A. *Sufficiency of the Evidence*

Appellant contends that no rational trier of fact could have found him guilty beyond a reasonable doubt of attempted arson or mail fraud. In a challenge based on the sufficiency of the evidence, it is well-settled that this court will affirm the conviction "if 'after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Gabriel*, 810 F.2d 627, 633 (7th Cir. 1987) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). "Only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt, may an appellate court overturn the verdict." *United States v. Lundy*, 809 F.2d 392, 396 (7th Cir. 1987) (quoting *Brandom v. United States*, 431 F.2d 1391, 1400 (7th Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971)). The evidence, viewed in the light most favorable to the government, was sufficient to allow the jury to find the appellant guilty beyond a reasonable doubt of both attempted arson and mail fraud. We will consider in turn the sufficiency of the evidence for each offense.

1. Attempted Arson

Appellant was convicted of violating 18 U.S.C. § 844(i) which provides in pertinent part:

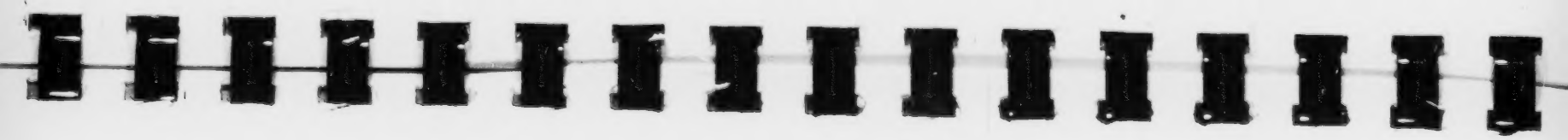
> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or

> an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both . . . .

The appellant contends that the evidence presented by the government was insufficient because there were no eyewitnesses to the attempted arson, no fingerprints linking the appellant to the crime, and the evidence presented by the government was largely circumstantial. Appellant's Br. at 18. However, we have held that circumstantial evidence is as relevant as direct evidence in establishing a defendant's guilt or innocence. *United States v. Bradshaw*, 719 F.2d 907, 921 (7th Cir. 1983). The government presented sufficient evidence that the fire was started intentionally. It also presented sufficient evidence of the appellant's motive, preparation and opportunity to set the fire.

Because the fire did not cause much damage to the store, the fire investigators could readily determine the cause of the fire and establish that it was started intentionally. The evidence submitted at trial showed that the outlet was "hot wired" to provide a steady supply of electricity and that the store's merchandise and records were coated with gasoline. To show the appellant's motive to attempt arson, the government introduced evidence of the appellant's mounting financial difficulties, including reduced sales, actions by coupon redemption centers to recover payments made to the appellant for redeemed coupons, and debts owed to suppliers and other creditors.

The government's evidence further showed the appellant's opportunity to set the fire. Evidence presented by the government at trial indicated that the appellant was in possession of the sole set of keys to the store on the night of the fire and that appellant's cousin delivered orange electrical cords, similar to those used to "hot wire" the outlet, to the appellant a few weeks before the fire. Further, evidence established that the appellant had ex-



perience working with electrical equipment and that the appellant was familiar with the alarm system so that he could enter the store and turn off the alarm before it sounded.

As stated in *Lundy*:

> This evidence is not overwhelming. But it is the jury's task to weigh the evidence and the credibility of witnesses . . . . We find that the evidence as a whole, indicating, *inter alia*, motive, plan, preparation, opportunity and absence of accident, is sufficient to sustain the conviction of arson.

809 F.2d at 397.

2. Mail Fraud

Appellant was convicted of three counts of mail fraud under 18 U.S.C. § 1341 which provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As in the conviction for attempted arson, the government presented sufficient evidence to sustain the convictions for mail fraud. First, the government introduced expert testimony that the appellant's estimated claims were overstated by at least two-hundred percent. Second, the evidence submitted at trial was sufficient to allow the jury to find that the appellant had set fire to the store. Thus, the jury could have concluded that the appellant falsely certified in his insurance claims that he had not caused the fire. *See Lundy*, 809 F.2d at 397. Accordingly, there was sufficient evidence for the jury to find the appellant guilty beyond a reasonable doubt of mail fraud.

B. *Evidence of Prior Misconduct*

Appellant contends that the government's submission of evidence of his prior misconduct was improper because its prejudicial effect outweighed its probative value. Specifically, the appellant claims that the introduction of evidence pertaining to "food stamp fraud, food coupon fraud, income tax fraud, state withholding tax fraud, gambling, and selling outdated food products" was improper under Fed. R. Evid. 404(b) and 403. Appellant's Br. at 10. Further, while only one objection was raised at trial, the appellant maintains that the prosecutor's closing argument also impermissibly prejudiced him by repeatedly referring to his prior misconduct to impugn his character. We will address in turn the admission at trial of appellant's prior misconduct and the prosecution's references to the misconduct during closing argument.

1. Evidence of Prior Misconduct Presented During the Trial

The appellant characterizes the evidence introduced at trial as "tending to show that the appellant was involved in some type of food stamp fraud, food coupon fraud, income tax fraud, state withholding tax fraud, gambling, and selling outdated food products." Appellant's Br. at 10. However, the appellant's contention mischaracterizes the evidence presented at trial. While the government did introduce evidence of health code violations, suits filed against the appellant by coupon redemption centers, numerous bounced checks and outstanding debts, the prosecution did not directly introduce evidence of food stamp fraud, tax fraud or gambling.[1] The government contends

[1] While the government presented evidence of sales and employees' wages claimed by appellant on his tax returns, this evidence was introduced primarily to show appellant's deteriorating financial condition rather than tax fraud. Further, evidence of food coupon fraud was introduced only indirectly as a means of showing the appellant's deteriorating financial position resulting from

(Footnote continued on following page)

that the evidence was properly admitted by the trial judge under Fed. R. Evid. 404(b) to show the appellant's motive for setting fire to his store. We uphold the district court's decision to admit this evidence.

We first note that a trial judge has " 'broad discretion when assessing the admissibility of proffered evidence' and may be reversed only upon a showing of abuse of discretion." *United States v. Buishas*, 791 F.2d 1310, 1313 (7th Cir. 1986) (quoting *United States v. Latham*, 754 F.2d 747, 751 (7th Cir. 1985)). We further note that defense counsel objected to the introduction of this testimony only once during trial.[2] In fact, defense counsel indicated in closing argument that his trial strategy was to refrain from objecting to the prior misconduct testimony. Defense counsel told the jury that "[i]f [the defendant] had something going on the side or if he made misrepresentations to the suppliers, or if he was puffing—you know, you heard the evidence. I didn't object. I want you to get the truth of exactly what happened." Tr. Vol. VII at 1148. The testimony of prior misconduct to which defense counsel failed to object will be reviewed under the plain error standard[3]

[1] *continued*
suits filed against him to recover money paid to him for redeemed coupons. Evidence that appellant had been involved in gambling only arose in response to the government's question concerning appellant's claimed $11,000 of gambling winnings on his tax return. Defense counsel, on cross-examination, clarified that these gambling earnings could result from winnings in the state lottery. While the government later used this evidence improperly in closing argument to impugn appellant's character, *see infra* at 11-16, the district court properly admitted this testimony at trial under Fed. R. Evid. 404(b) and 403.

[2] Defense counsel objected to testimony regarding newspaper coupons located in Mr. Fakhoury's home. The trial judge ruled that the testimony was admissible for the limited purpose of demonstrating the defendant's motive, i.e. his deteriorating financial condition, to commit the attempted arson. To avoid prejudice to the defendant, the trial judge gave the jury a limiting instruction.

[3] Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

while the admission of the evidence to which defense counsel presented a contemporaneous objection will be reviewed under the abuse of discretion standard.

This court has held that "evidence of uncharged misconduct is admissible only if it meets the following requirements: (1) it fits within an exception recognized by Rule 404(b) of the Federal Rules of Evidence, (2) its probative value outweighs its prejudicial effects, and (3) the misconduct is proved by clear and convincing evidence."[4] *United States v. Byrd*, 771 F.2d 215, 220 (7th Cir. 1985); *see also United States v. Liefer*, 778 F.2d 1236, 1242 (7th Cir. 1985); *United States v. Shackleford*, 738 F.2d 776, 779 (7th Cir. 1984). We find that these requirements are satisfied in this case.

Fed. R. Evid. 404(b) provides that evidence of other wrongs is not admissible to prove the character of a person, but is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The evidence of appellant's deteriorating financial condition was relevant to show his motive to attempt arson and to send fraudulent claims on his proof-of-loss statements to the insurance company. "Evidence that tends to show that a defendant is living beyond his means is of probative value in a case involving a crime resulting in financial gain." *United States v. Feldman*, 788 F.2d 544, 557 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 955 (1987). The prejudicial effect of this evidence to the defendant did not substantially outweigh its probative value. Further, the prior misconduct was proved by clear and convincing evidence. The government presented numerous

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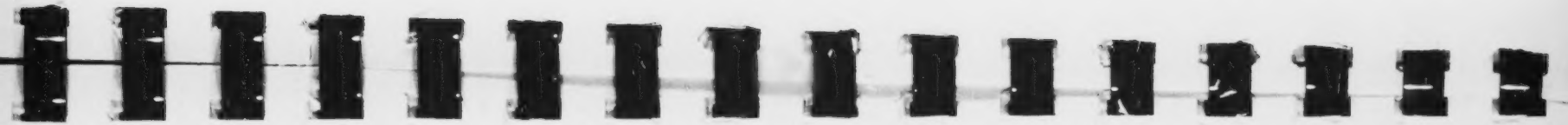
[4] As noted in *United States v. Byrd*, 771 F.2d 215 (7th Cir. 1985), another factor often considered when determining the admissibility of prior misconduct is whether the uncharged misconduct is similar to the crimes charged. "This requirement may be appropriate when the uncharged misconduct is offered to show intent, but it appears to us inappropriate when the purpose is to show motive." *Id.* at 220 n.1. Thus, we will not consider this factor in this case because evidence of the appellant's uncharged misconduct was introduced to show motive.

witnesses and documentary evidence to show the appellant's debts, bounced checks, pending suits to recover money for redeemed coupons, and health code violations in the store. The admission of this evidence did not constitute an abuse of discretion and certainly did not constitute plain error.

2. Prosecutorial Misconduct During Closing Argument

The appellant claims that his convictions should be overturned because of numerous improper references during closing argument about the appellant and his prior misconduct. The closing argument is replete with comments maligning the appellant's character. For example, when recalling for the jury the evidence about the coupon redemption lawsuit, the prosecutor stated that he lied about having a larger store than he actually owned "to line his own pockets, because even though he was cheating, the skim off the store wasn't enough to feed his little greedy appetite, so he had to go into the coupon redemption business, too." Tr. Vol. VII at 1121-22. When recounting that the appellant claimed $8,000 in unemployment benefits from Illinois, the prosecutor commented that this constituted "[a]nother lie, another fraud, perpetrated by this man to line his own pockets." *Id.* at 1123. The prosecutor further maligned the appellant's character when he referred to the numerous checks bounced by him: "[$]65,000 worth of checks were bounced. Is that indicative of a store that's thriving or is that indicative of a man who is trying to cheat everybody he can, tell them a lie . . . ." *Id.* at 1124. When recalling the health code violations in the store, the prosecutor used the highly provocative example of selling post-dated baby formula. "Well, ladies and gentlemen, I don't think I would want my worst enemy to serve their baby post-dated formula." *Id.* at 1126.

In rebuttal to defense counsel's closing argument, the prosecutor's remarks became even more reprehensible. The prosecutor suggested to the jury that the appellant may have been responsible for the death of his father that occurred prior to the attempted arson.



> The other thing I want to talk about is the father's death. This is not a murder case. That's not to be decided here. But from where I'm sitting, I'll tell you a couple of things. Who stood to gain the most from the father's death? Who wanted to sell the store and wasn't allowed to by the father? Who was the number one son? Who was taking money from the store that Mr. Neville told you he complained about his own father, complained to a stranger? There are serious questions here, but they are not to be resolved in this case.

Id. at 1186-87. Further, the prosecutor attempted to elicit any prejudice the jurors might harbor against the appellant resulting from his Jordanian heritage.

> [The defendant] came to this country in 1974, and when he came to this country, he agreed to obey the law, to come in, into this land of opportunity, and to look for opportunities. And he did find one. . . . But it wasn't good enough for him. He wanted more, and he wanted more fast. He had big plans. He wanted quick, easy success.
>
> And American [sic] became not the land of opportunity, but the land of fraud, and we see one fraud unfold after the next.

Id. at 1197.

The prosecutor's comments during closing argument must be divided into two categories for the purposes of this appeal: the remarks to which defense counsel objected at trial and the remarks to which he did not make a contemporaneous objection. The standard of review for each category is different. For those comments to which defense counsel presented a contemporaneous objection, we must "determine whether those remarks were so prejudicial as to deprive the defendant of a fair trial." *United States v. Lewis*, 797 F.2d 358, 369 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1308 (1987). For those remarks to which defense counsel failed to object, we must review for plain error. *Id.* We shall analyze each category in turn.

Defense counsel made only one contemporaneous objection to the prosecutor's reference during his rebuttal argument to the appellant's prior misconduct.[5] When the prosecutor stated that the appellant was involved with unemployment fraud, defense counsel objected on the ground that there was no evidence presented during trial that the appellant was collecting unemployment benefits fraudulently. The district judge sustained this objection. Tr. Vol. VII at 1197.

In evaluating a claim of prosecutorial misconduct where defense counsel presented a contemporaneous objection, we must determine whether the prosecutor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 106 S. Ct. 2464, 2472 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see also United States v. Torres*, 809 F.2d 429, 435 (7th Cir. 1987) (citing *United States v. Peco*, 784 F.2d 798, 805 (7th Cir.), *cert. denied*, 106 S. Ct. 2281 (1986); *United States v. Hattaway*, 740 F.2d 1419, 1425 (7th Cir.), *cert. denied*, 469 U.S. 1089 (1984); *United States v. Zylstra*, 713 F.2d 1332, 1339 (7th Cir.), *cert. denied*, 464 U.S. 965 (1983)). "[T]he well-settled standard of review [is] that we are to consider the prosecutor's conduct not in isolation, but in the context of the trial as a whole, to determine if such conduct was 'so inflammatory and prejudicial to the defendant . . . as to deprive him of a fair trial. . . .' " *United States v. Chaimson*, 760 F.2d 798, 809 (7th Cir. 1985) (citing *Zylstra*, 713 F.2d at 1339; *see also Peco*, 784 F.2d at 805). Applying this standard to the prosecutor's state-

[5] Defense counsel made another contemporaneous objection, but it was not directed at the prosecutor's reference to the appellant's prior misconduct. Defense counsel objected to the prosecutor's statement that the wiring of the fuse box in and of itself convicted the appellant of attempted arson. In response to the objection, the district court admonished the jury that the arguments of counsel were not evidence in the case and that they were to rely only upon the evidence presented to determine the appellant's guilt or innocence. Tr. Vol. VII at 1193.

ment that the appellant was involved in unemployment fraud, we do not find that this comment was so inflammatory and prejudicial to deny the appellant a fair trial. The district judge sustained defense counsel's objection to this comment and instructed the jury both before and after closing arguments that the arguments of counsel were not to be considered as evidence.

However, many of the prosecutor's remarks to which defense counsel failed to object were much more prejudicial and inflammatory. These comments, however, must be reviewed under the plain error doctrine. The Supreme Court has stated that "the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)); *see also United States v. Lewis*, 797 F.2d 358, 369 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1308 (1987). We must evaluate a case for plain error by viewing the claim not in isolation, but against the entire record. *Young*, 470 U.S. at 16.

Viewing the prosecutor's remarks in the context of the entire record, we find that they do not justify reversal of the convictions. While we find the conduct of the Assistant United States Attorney to be reprehensible, we find that the statements neither undermined the fairness of the trial nor contributed to a miscarriage of justice. First, as discussed previously, references to the appellant's uncharged misconduct were permissible under Fed. R. Evid. 404(b) and 403. Thus, although we do not condone the prosecutor's grossly improper statements, it was permissible for him to link the appellant's prior misconduct to his motive to attempt arson. This case, therefore, does not involve prosecutorial comment implicating specific constitutional provisions, such as the defendant's right to remain silent, but rather involves excessive and inflammatory commentary about the appellant's conduct on matters which, at least to some extent, were relevant to his motive to set fire to his store. *Compare United States*

v. Robinson, 794 F.2d 1132, 1136 (6th Cir. 1986) (plain error found where, "[b]y raising before the jury's eyes the spectre of defendant's silence, the prosecutor . . . encouraged the jurors to make inferences unfavorable to the defendant based solely upon [his] right to remain silent"), *cert. granted*, 107 S. Ct. 1282 (1987).

Second, the district court, immediately before and after closing argument and several other times during trial, instructed the jury that the statements of counsel were not evidence in the case. These repeated cautionary instructions alleviated any prejudice resulting from the prosecutor's disparaging remarks. *See United States v. Sawyer*, 799 F.2d 1494, 1507 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 961 (1987). Finally, while the evidence of appellant's guilt is not overwhelming, it is sufficient to eliminate "any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations. . . ." *Young*, 470 U.S. at 19. Thus, on this record, we hold that the prosecutor's closing argument, although highly improper, did not constitute plain error.

While we do not believe that the misconduct of the prosecutor in this case justifies reversal of the conviction, we frankly do not understand why the trial judge allowed this unprofessional conduct to go unsanctioned. Remarks of this nature are reprehensible when uttered by any member of the bar. When they come from the mouth of a representative of the United States, they demean in a very special way the administration of criminal justice.

III

Ineffective Assistance of Counsel

The appellant contends that he was denied a fair trial because of ineffective assistance of counsel. Appellant claims that his trial counsel's performance was deficient because he left the courtroom during the government's direct examination of a witness and because he was chastised by the trial judge for such improper behavior. Appellant also raises the novel claim that trial counsel's

failure to recuse himself because he had the same last name as a witness for the defense whose credibility was questioned by the government prejudiced the defendant. Appellant claims that "the jury, lead to distrust [the witness], . . . most probably was influenced to similarly distrust [trial counsel] . . . because they shared the same last name." Appellant's Br. at 22. Lastly, appellant contends that trial counsel's statement, in a letter written to the district judge before sentencing, that had he known about the contents of the confidential informant's report, he would have advised his client to plead guilty, undermined the appellant's position at sentencing that he was innocent.

In analyzing ineffective assistance of counsel claims, we must determine whether the appellant has satisfied his burden of showing both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1013 (7th Cir. 1987). However, a court need not assess both components of the test if the defendant makes an inadequate showing on one. As the Supreme Court noted, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697; *see also United States ex rel. Smith v. Lane*, 794 F.2d 287, 290 (7th Cir. 1986).

In this case, we need not assess the performance component of the *Strickland* analysis because the appellant clearly has not satisfied his burden of showing prejudice. While trial counsel was reprimanded by the district judge for leaving the courtroom when the government was presenting its case, this incident would have little prejudicial effect on the jury's deliberations, especially since the trial judge spoke to counsel while the jury was not present. Further, appellant clearly was not disadvantaged by the fact that trial counsel and a witness shared the same surname. The first question defense counsel asked the wit-

ness after he identified himself was whether they were related. Tr. Vol. VI at 905. Therefore, there was no reason for the jurors to be prejudiced toward defense counsel because he shared the witness's surname. Finally, the district judge specifically stated in the sentencing proceedings that he would disregard trial counsel's assertion in a letter that he would have advised appellant to plead guilty if he had known the contents of the informant's report. Therefore, this statement did not prejudice the appellant. Accordingly, we find appellant's contention that he was denied the effective assistance of counsel to be without merit.

IV

Right to Confront the Confidential Informant

Appellant contends that he was denied a fair trial because he was unable to confront the confidential informant who supplied the FBI with information that appellant's store was an arson target. The informant did not testify at trial, but FBI Agent Paul J. Vina testified that the FBI surveillance of appellant's store commenced as a result of the informant's tip. The government submitted two documents summarizing the information furnished by the informant to the court for *in camera* review. After reviewing the documents, the district judge found that they contained inculpatory evidence. Because the FBI was utilizing the informant in ongoing investigations and because the government was not planning to call the informant as a witness, the trial judge ruled that it would not disclose the contents of the documents to defense counsel. Tr. Vol. II at 58-59.

In evaluating whether the government must disclose the identity of an informant, the Supreme Court has indicated in *Roviaro v. United States*, 353 U.S. 53 (1957), that the courts must balance the "public interest in obtaining information necessary to apprehend those who have committed crimes against the defendant's interest in a fair trial." *United States v. Andrus*, 775 F.2d 825, 841 (7th

Cir. 1985). "Where the informer is a mere 'tipster,' disclosure of his identity will rarely be appropriate under the balancing test of *Roviaro*." *United States v. Lewis*, 671 F.2d 1025, 1027 (7th Cir. 1982).

Applying this balancing test, we hold that the district court correctly decided that there was no need to disclose the identity of the informant. The informant was not a witness at trial and the information he supplied merely initiated the FBI's investigation of appellant's store. Knowing the informant's identity would not have aided the appellant's defense. Therefore, appellant's right to confront witnesses was not violated by the district court's decision to maintain the confidentiality of the informant's identity.

Conclusion

We find that the district court properly admitted evidence of appellant's prior misconduct and that the prosecutor's comments during closing argument did not constitute plain error. Further, appellant's rights to the effective assistance of counsel and to confront adverse witnesses were not denied. Accordingly, we affirm the judgment of the district court.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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CG 183C-2025

Consensual Monitoring
August 31, 1984
3:18 p.m.

(Non-Pertinent Conversation)

Special Agent Paul J. Vina: This is Special Agent Paul J. Vina, Chicago, FBI, the date is August 31, 1984 and the time is 3:18 p.m. Shortly I'll be going into the Casablanca Supermarket located at 1108 West 51st Street.

(Pause)

(Car Door Slams)

(Background Noises and Conversations)

SA VINA: Got any gum?

UNKNOWN MALE(UM): Yes.

SA VINA: Uh uh sugarless gum.

UM: We're out of sugarless except for Freedent.

SA VINA: That's fine. Is that guy the owner there

huh?

UM: Yeah.

SA VINA: What do I owe you?

UM: Uh 30 cents.

SA VINA: 30?

UM: Yeah.

(Pause)

SA VINA: What what's his name?

UM: Sam.

SA VINA: Sam?

(Pause)

(Background Noises and Conversations)

SA VINA: Are you the owner?

SALIM: Yeah.

SA VINA: Sam, can we, can I talk to you a minute?

SALIM: Yeah.

(Pause)

SA VINA: Listen uh I'm looking for a job to do you got anything uh ...

SALIM: Not really.

SA VINA: You don't have anything?

SALIM: No.

SA VINA: All right I'll tell ya what, why I'm here I was uh, I heard that you were looking for somebody to take care of your business here.

SALIM: In which way.

SA VINA: I don't think were you looking for somebody to uh, oh I thought maybe you had uh, oh you don't you're not, hmm...

SALIM: Where you live at?

SA VINA: Huh?

SALIM: Where you live at?

SA VINA: Where do I, oh I live right a few blocks there.

SALIM: Yeah?

SA VINA: I just heard that you might have been interested.

SALIM: No.

SA VINA: No? Well thought maybe I could uh...

SALIM: I I I got another guy working here. Uh remember here brother-in-law.

SA VINA: Your brother-in-law. No, I don't know if he uh you understand what I'm saying?

SALIM: Yeah.

SA VINA: What am I saying?

SALIM: You want to, you want to run the show here.

SA VINA: No, no, no, no, no.

SALIM: No, I don't know what you're talking about then. Just say it clear.

SA VINA: Uh I heard on the street that you need somebody to torch your place.

SALIM: Out on the street?

SA VINA: Yeah, you know street talk. You know you're looking for somebody to do it.

SALIM: You heard on the street?

SA VINA: (Laughs).

SALIM: Serious?

SA VINA: Yeah, so...

SALIM: Who told you that?

SA VINA: Fine, you know that's why I'm here you need uh...

SALIM: I thought you were talking about work?

SA VINA: No I was talking about uh, well it's work but uh you know I mean. Are are you the owner?

SALIM: Yeah, yes.

SA VINA: You you...

SALIM: I'm happy with the business the way...

SA VINA: Oh you are happy with it? Oh, cuz I heard you were not happy with the business and you wanted, you were looking for somebody...

SALIM: I don't know who told you that. They probably the one's they

try to burn the place already 4-5 times.

SA VINA: Oh they did? Oh?

SALIM: I don't know who tell you could be he's the one.

SA VINA: You think he the one who tried to...

SALIM: The place well...

SA VINA: I just heard the business was...

SALIM: ...the last two years.

SA VINA: Oh is that right?

SALIM: Try to burn the place 4 - 5 times.

SA VINA: I just heard that the business was pretty bad and you wanted to uh you know...

SALIM: Well the (inaudible).

SA VINA: Are are you the owner?

SALIM: Yeah.

SA VINA: What's your name?

SALIM: Sam.

SA VINA: Sam?

SALIM: Right.

(Pause)

(Background Noises and Conversations)

SA VINA: Sam are you, you thinking, you thinking uh you know what I mean, do you have somebody else that owns it with you maybe that's looking for this or ...

SALIM: No.

SA VINA: Oh, you're the only owner?

SALIM: Yeah.

SA VINA: And you're not ...

SALIM: Oh no.

SA VINA: Oh well ...

SALIM: I don't know who told you but bullshit you.

SA VINA: Huh?

SALIM: Was probably he he somebody try to burn, do it before.

SA VINA: Oh is that right?

SALIM: The place 4 or 5 times.

SA VINA: Oh see I thought it was ...

SALIM: 4 times exactly burn the place up.

SA VINA: Oh cuz they said that you were looking for some insurance money and then you know I need the job and I thought maybe you know ...

SALIM: Oh.

SA VINA: ... maybe we can strike a deal.

(Pause)

SALIM: Well if I'm looking for something like that don't even bother to say, because I don't know who told you that okay. He probably, probably the one who burned the place down.

SA VINA: Okay.

SALIM: I own small business.

SA VINA: Okay, Sam.

SALIM: Okay nice meeting you.

SA VINA: Yeah I'll check that with you some other time and maybe ...

(Pause)

SALIM: What you thinking about lay off man, what's in my head.

SA VINA: Oh okay, all right.

SALIM: I don't do stuff like that see I don't know who told you that, he probably, I don't known what you talking about, store different store.

SA VINA: Well think it could be next door?

SALIM: Could be.

SA VINA: Who, what is the name of the guy over there do you know?

SALIM: I don't know.

SA VINA: Oh you don't know the name of the guy? He said your name sounded like Sam but it didn't, it wasn't really Sam so maybe this uh ...

SALIM: Sam, his name is Sam too.

SA VINA: Oh his name is Sam too? But I mean is this your name Sam?

SALIM: No, no.

SA VINA: Oh. You're not Sam then? Oh?

(Pause)

SALIM: Where you work at down there?

SA VINA: I'm not working.

SALIM: Where do you live at?

SA VINA: 151st by 2300 West on 51st.

SALIM: You're not working (inaudible)?

(Pause)

(Background Noises)

SALIM: You're in the wrong business.

SA VINA: Yeah. What what's the name of your store?

SALIM: Casablanca.

SA VINA: Casablanca?

SALIM: Uh huh (inaudible) talk

to.

SA VINA: Well that's what I heard.

SALIM: (Inaudible)

SA VINA: No Casablanca, yeah but I didn't see the name.

(Pause)

(Background Noises)

SALIM: (Inaudible)

SA VINA: Okay.

(Pause)

(Background Noises and Conversations)

(Car Door Opens and Closes)

(Car Engine Started)

SA VINA: This is SA Vina, the time now is 3:28 p.m. and I'm gonna be shutting off this Nagra recorder.

SA: This is Special Agent (Inaudible) the file number in this investigation is 183C-2025 and the time is now 4:20 p.m. and I'm

gonna be shutting off this Nagra again.

(M o n i t o r i n g Discontinued)

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his Defense.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction to the equal protection of the law.

RULE 403 FEDERAL RULES OF EVIDENCE

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 404 FEDERAL RULES OF CIVIL PROCEDURES

CHARACTER EVIDENCE NOT ADMISSABLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a persons character or a trait of his character is not admissible

for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of the accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim ...

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to chow that he acted in conformity therewith. If may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

RULE 52 FEDERAL RULES OF CRIMINAL PROCEDURE

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Supreme Court, U.S.
FILED
DEC 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-651

In the Supreme Court of the United States

OCTOBER TERM, 1987

SALIM FAKHOURY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

Page

Cases:

Darden v. *Wainwright*, No. 85-5319 (June 23, 1986) 5, 6
Huddleston v. *United States*, cert. granted, No. 87-6 (Oct. 13, 1987) 5
Strickland v. *Washington*, 466 U.S. 668 (1984) 4, 6
United States v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979) 5
United States v. *Byrd*, 771 F.2d 215 (7th Cir. 1985) 5
United States v. *Culpepper*, No. 86-2867 (10th Cir. Dec. 7, 1987) 5
United States v. *Currier*, No. 86-2131 (1st Cir. Dec. 10, 1987) 5
United States v. *Dothard*, 666 F.2d 498 (11th Cir. 1982) .. 5
United States v. *Lavelle*, 751 F.2d 1266 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985) 5
United States v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S 958 (1976) 5
United States v. *Martin*, 773 F.2d 579 (4th Cir. 1985) 5
United States v. *Robinson*, 794 F.2d 1132 (6th Cir. 1986), cert. granted, No. 86-937 (Feb. 23, 1987) 6
United States v. *Vaccaro*, 816 F.2d 443 (9th Cir. 1987) ... 5
United States v. *Weber*, 818 F.2d 14 (8th Cir. 1987) 5
United States v. *Young*, 470 U.S. 1 (1985) 6

Statutes and rules:

18 U.S.C. 844(i) 1
18 U.S.C. 1341 1
Fed. R. Evid.:
Rule 403 4
Rule 404(b) 3, 4, 5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly admitted certain extrinsic act evidence under Fed. R. Evid. 404(b) and that the prosecutor made improper use of that evidence during closing argument. He also asserts that he was denied the effective assistance of counsel.

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of attempted arson, in violation of 18 U.S.C. 844(i), and three counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to a total of eight years' imprisonment and a consecutive five-year term of probation.

The evidence at trial showed that on the evening of September 25, 1984, petitioner burned down his failing store, Casa Blanca Liquors & Groceries, in order to collect insurance proceeds. The evidence showed that the fire was set intentionally. A gasoline-type substance had been spread throughout the store and over the store's merchandise and records. The store's fuse box and wiring system had been "hot wired" so that a steady electrical current could continue uninterrupted from an electrical outlet,

controlled by an electronic timer, through two orange extension cords to cans of gasoline placed in two separate areas of the store. The evidence further indicated that petitioner set the fire. Petitioner was in possession of the only set of keys to the store on the night of the fire, he received a set of orange extension cords like those used in the fire shortly before the fire was set, and he had past experience working with electrical equipment. Furthermore, the fire investigators found no indication of a forced entry onto the premises: the store doors and windows were secure, and the store's alarm system sounded when the firefighters entered. Pet. App. 2a-3a.

The government introduced extensive evidence establishing petitioner's motive for destroying the store. Petitioner and his father purchased the store in June 1982 for approximately $108,000. After that, petitioner's financial condition and his business steadily deteriorated. The government showed, for example, that petitioner's personal bank account had declined from an initial balance of $18,972.29 in January 1984 to a negative balance of $410.66 in September 1984. The store's checking account was also overdrawn, and the store owed $97,000 to its creditors. The store showed a history of declining purchases from suppliers and reduced food stamp redemptions, both of which indicated diminishing sales. The store's physical condition was likewise deteriorating. City health inspectors testified that the store violated health code standards that regulated sanitation and prohibited the stocking of products after their sales expiration date. The government also established that various coupon redemption centers sought to recover coupon remittances from petitioner on the ground that he submitted far more coupons than could have been used by the store's customers. Pet. App. 2a-3a.

The government next showed that on September 4, 1984, in the face of these financial difficulties, petitioner increased his fire insurance coverage, adding a $40,000

loss of earnings clause to the store's $150,000 fire insurance policy. The government then detailed petitioner's attempts to collect on his fire insurance policy. After the fire, petitioner sent three separate proof-of-loss statements to his insurance company. In the first statement, petitioner estimated his losses to be $97,033.66. His second claim was identical to the first. In his third claim, petitioner claimed the same amount of losses but certified that they were his actual, rather than estimated, losses. An independent insurance adjuster handling the claim on behalf of the insurance company estimated that petitioner's claims were overstated by at least 200 percent. In all three claims, petitioner certified that he had not caused the fire. Pet. App. 3a-4a.

2. Petitioner appealed his conviction, urging that the government produced insufficient evidence to support the jury verdict, that the trial court made a number of erroneous evidentiary rulings, and that his trial attorney did not provide him with the effective assistance of counsel. The court of appeals affirmed (Pet. App. 1a-17a). The court of appeals first concluded that there was ample evidence to support the conviction (*id.* at 4a-6a). It next ruled that the district court did not abuse its discretion by admitting, pursuant to Fed. R. Evid. 404(b), evidence of health code violations, suits filed against petitioner by coupon redemption centers, bounced checks, and outstanding debts. The court of appeals concluded that that evidence was properly admitted "to show [petitioner's] motive for setting fire to his store" (Pet. App. 8a). The court of appeals also carefully considered (*id.* at 10a-14a) whether the prosecutor's closing argument, which contained "excessive and inflammatory commentary" (*id.* at 13a), required that petitioner's conviction be reversed. The court criticized the prosecutor's commentary but nevertheless concluded that his remarks did not deny petitioner a fair trial (*id.* at 13a-14a). Finally, the court of appeals re-

jected petitioner's ineffective assistance of counsel claim. The court observed that petitioner was obliged to show "both that counsel's performance was deficient and that the deficient performance prejudiced [his] defense" (*id.* at 15a, citing *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984)). The court examined each of the three incidents of allegedly ineffective assistance cited by petitioner and concluded that none of them required reversal. Pet. App. 15a-16a.

3. The court of appeals correctly affirmed petitioner's conviction. The petition for a writ of certiorari does not present any issue warranting review by this Court.

a. Petitioner renews his contention (Pet. 23-35) that the district court erred in allowing the introduction of evidence concerning petitioner's bounced checks, health code violations, and questionable coupon redemption practices. The court of appeals, however, correctly recognized (Pet. App. 9a) that this evidence of petitioner's deteriorating financial situation was directly relevant in establishing petitioner's motive to commit the arson and that the probative value of the evidence clearly outweighed any danger of unfair prejudice. See Fed. R. Evid. 403.[1] Petitioner is mistaken in suggesting that extrinsic act evidence may not be introduced "when the purpose is to show motive" (Pet. 26). The Federal Rules of Evidence expressly provide otherwise. Rule 404(b) forbids the use of "other crimes, wrongs, or acts" to prove the character of the person. But the Rule explicitly states that such

[1] This evidence — which demonstrated that petitioner's business was failing — had unassailable probative force in establishing petitioner's financial situation. Furthermore, the evidence had scant potential for suggesting a decision on an emotional or other improper basis. The described activities were relative minor wrongs that paled in comparison to the crime of arson. Petitioner's counsel objected to only one portion of this evidence at trial, and the court gave the jury a limiting instruction. See Pet. App. 8a. Plainly, the probative value of this evidence far outweighed any possibility of unfair prejudice.

evidence may be used "for other purposes, such as proof of motive * * *" (*ibid.*).[2]

b. Petitioner argues at great length (Pet 35-45) that the prosecutor's closing argument was improper. The court of appeals carefully considered that question and correctly ruled that the prosecutor's remarks, though "excessive and inflammatory" (Pet. App. 13a), did not deny petitioner a fair trial (*ibid.*). The court properly evaluated the prosecutor's conduct, applying this Court's decisions in *Darden* v. *Wainwright*, No. 85-5319 (June 23, 1986), and

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[2] The circuits are presently divided on the question whether the government must first prove that the defendant has committed "other crimes, wrongs or acts" before evidence of those activities may be admitted. The Seventh Circuit generally requires the government to prove by clear and convincing evidence that defendant committed the acts that are offered into evidence under Rule 404(b). See *United States* v. *Byrd*, 771 F.2d 215, 220 (7th Cir. 1985). The Eighth, Ninth, and District of Columbia Circuits take a similar approach. See *United States* v. *Weber*, 818 F.2d 14, 15 (8th Cir. 1987); *United States* v. *Vaccaro*, 816 F.2d 443, 452 (9th Cir. 1987); *United States* v. *Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985). The First, Second, Fourth, Fifth, Tenth, and Eleventh Circuits follow less restrictive practices. See *United States* v. *Currier*, No. 86-2131 (1st Cir. Dec. 10, 1987), slip op. 12-17; *United States* v. *Leonard*, 524 F.2d 1076, 1090-1091 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *United States* v. *Martin*, 773 F.2d 579, 582-583 (4th Cir. 1985); *United States* v. *Beechum*, 582 F.2d 898, 912-913, 916 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States* v. *Culpepper*, No. 86-2867 (10th Cir. Dec. 7, 1987), slip op. 9-10; *United States* v. *Dothard*, 666 F.2d 498, 502 (11th Cir. 1982). This Court has recently granted a petition for a writ of certiorari to resolve this conflict. See *Huddleston* v. *United States*, No. 87-6 (Oct. 13, 1987). There is, however, no reason to hold this case pending the decision in *Huddleston*. The Seventh Circuit concluded here that the government established by clear and convincing evidence that petitioner committed the acts alleged. See Pet. App. 9a-10a. Thus, the government has already satisfied the most restrictive standard applied by any court for the admission of such evidence.

United States v. *Young*, 470 U.S. 1 (1985). It concluded that, in the case of prosecution remarks that received a contemporaneous objection, the prosecutor's statements did not " 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process' " (Pet. App. 12a-13a (quoting *Darden*, slip op. 12)). The court further concluded that those remarks that did not receive a contemporaneous objection, and were therefore subject to the plain error rule, "neither undermined the fairness of the trial nor contributed to a miscarriage of justice" (Pet. App. 13a). See *Young*, 470 U.S. at 15. In addition, the court of appeals observed that the trial court's repeated cautionary instructions alleviated any prejudice resulting from the prosecutor's disparaging remarks. Pet. App. 14a. The court of appeals' factbound determinations on those issues do not warrant further review.[3]

c. Lastly, petitioner renews his claim, based primarily on three innocuous trial incidents (Pet. 55-58), that he was denied the effective assistance of counsel. The court of appeals, applying the standards set forth in *Strickland* v. *Washington*, *supra*, correctly concluded that it need not even examine whether defense counsel's performance was deficient, because petitioner "clearly has not satisfied his burden of showing prejudice" (Pet. App. 15a). First, petitioner was not prejudiced by the trial court's reprimand of defense counsel for leaving the courtroom during the goverment's presentation of its case, because "the trial

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[3] The court of appeals properly distinguished this case from *United States* v. *Robinson*, 794 F.2d 1132 (6th Cir. 1986), cert. granted, No. 86-937 (Feb. 23, 1987). The court observed that this case, unlike *Robinson*, "does not involve prosecutorial comment implicating specific constitutional provisions, such as the defendant's right to remain silent, but rather involves excessive and inflammatory commentary about the [petitioner's] conduct on matters which, at least to some extent, were relevant to his motive to set fire to his store" (Pet. App. 13a) There is accordingly no reason to hold this case pending this Court's review of *Robinson*.

judge spoke to counsel while the jury was not present" (*ibid.*). Second, petitioner was not prejudiced by the fact that his counsel and a government witness shared the same surname, because counsel asked the witness at the start of cross-examination whether they were related and established that they were not (*id.* at 15a-16a). Third, petitioner was not prejudiced in any way by counsel's assertion to the court before sentencing that, had he known of certain evidence before trial, he would have advised petitioner to plead guilty. The court of appeals observed that "the district judge specifically stated in the sentencing proceedings that he would disregard" the remark (*id.* at 16a). Because none of those incidents suggests any serious default by counsel or any prejudice to petitioner as a result, the court of appeals properly rejected petitioner's ineffective assistance of counsel claim.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1987

[4] Petitioner also lists, without discussion, several other alleged flaws in his counsel's performance (see Pet. 56-57). None of those asserted defects can be said to have resulted in the ineffective assistance of counsel. For example, petitioner claims that his counsel improperly failed to seek the exclusion of certain admissions made by petitioner to law enforcement officers. Petitioner's statements, however, were made at the scene of the fire and on the following day, and were not the products of custodial interrogation.

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